

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 19, 2003

IN RE:

**PETITION OF UNITED CITIES GAS COMPANY FOR
APPROVAL OF AN AMENDMENT TO ITS
FRANCHISE AGREEMENT WITH ELIZABETHTON,
TENNESSEE**

DOCKET NO. 02-01020

INITIAL ORDER OF HEARING OFFICER ON THE MERITS

This matter is before the Hearing Officer of the Tennessee Regulatory Authority (the "Authority") for a decision on the merits with regard to the *Petition of United Cities Gas Company for Approval of an Amendment to Its Franchise Agreement with Elizabethton, Tennessee* (the "*Petition*") filed by United Cities Gas Company ("United Cities" or the "Company").

United Cities' *Petition*

In its *Petition*, filed on September 18, 2001, United Cities requests Authority approval, pursuant to Tenn. Code Ann. § 65-4-107, of an amendment to its franchise agreement with the City of Elizabethton, Tennessee ("Elizabethton" or the "City"). The amendment is contained in a City ordinance passed by the Elizabethton City Council on August 8, 2002 and effective ten (10) days from that date. The August 8, 2002 ordinance, Elizabethton Ordinance No. 38-9, amends Ordinance No. 23-8, adopted on July 23, 1987. Ordinance No. 23-8 grants to United Cities the right to provide natural gas service in Elizabethton for a term of twenty (20)

years from and after April 15, 1988. Ordinance No. 38-9 amends Ordinance No. 23-8 to impose upon United Cities a franchise fee equal to five percent (5%) of United Cities' gross receipts derived from the sale and distribution by United Cities of natural gas within the city limits of Elizabethton. A copy of the ordinance is attached hereto as Exhibit A. No person sought intervention in this matter.

Pursuant to a public notice issued on December 10, 2002, a Hearing on the merits of United Cities' *Petition* was held on January 9, 2003. The Company was represented by the following counsel:

Joe A. Conner, Esq.; and **Misty Smith Kelley, Esq.;** Baker, Donelson, Bearman & Caldwell, 1800 Republic Center, 633 Chestnut Street, Chattanooga, Tennessee 37450

Requirement of and Standards for Authority Approval

Tenn. Code Ann. § 65-4-107 provides that no grant of a privilege or franchise from the State or a political subdivision of the State to a public utility shall be valid until approved by the Authority. Approval pursuant to Tenn. Code Ann. § 65-4-107 requires a determination by the Authority, after hearing, that "such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest."¹ Tenn. Code Ann. § 65-4-107 further provides that in considering such privilege or franchise, the Authority "shall have the power, if it so approves, to impose conditions as to construction, equipment, maintenance, service or operation as the public convenience and interest may reasonably require . . ."²

Pre-filed Testimony of Ricky Watford

On January 6, 2003, United Cities filed the Direct Testimony of Ricky Watford, United Cities' Operations Supervisor Johnson City and Elizabethton, Tennessee. Mr. Watford

¹ Tenn. Code Ann. § 65-4-107.

² *Id.*

stated that United Cities' natural gas distribution system for Elizabethton contains approximately eighty-seven (87) miles of pipe, of which approximately twenty-six (26) is located outside of the Elizabethton city limits but is interconnected with and dependent upon the distribution system located within the city limits of Elizabethton. United Cities serves approximately 2900 customers within the city limits of Elizabethton, of whom approximately eighty percent (80%) are residential and twenty percent (20%) are commercial and industrial. The majority of the pipeline in United Cities' distribution system is located within the public rights-of-way. Mr. Watford stated that without access to these public rights-of-way, United Cities could not adequately operate, maintain, or replace its distribution system.

According to Mr. Watford, United Cities and its predecessors have operated for many years in Elizabethton under various franchise agreements with the City. The current franchise agreement was enacted on July 23, 1987 and is for a twenty (20) year term. The current agreement states that no franchise fee will be charged. During 2002, Mr. Charles Stahl, City Manager for the City of Elizabethton, contacted representatives of United Cities to communicate that the City desired to enter into negotiations to allow the City to charge a franchise fee. Together with Mr. Bobby Cox, Operations Supervisor for the United Cities region that includes Elizabethton, Mr. Watford was designated to negotiate with the City. Mr. Cox and Mr. Watford met with representatives of the City on more than one occasion. According to Mr. Watford, Mr. Cox and Mr. Watford attempted to negotiate the lowest fee possible. The parties eventually agreed on a five percent (5%) fee, and United Cities drafted a proposed amendment to the current franchise agreement to provide for such a fee. After the amendment was revised several times by both the Company and the City, the City Council

approved the amendment and enacted it in an ordinance. Mr. Watford stated that the amendment was the result of arm's-length negotiations between the Company and the City.

Mr. Watford further stated:

Without this franchise, United Cities would be unable to feasibly operate, maintain, replace and/or extend the service to the customers it currently serves. In addition, there are no other feasible options for the supply of natural gas to the vast majority of the customers currently served by United Cities in Elizabethton. These customers depend on United Cities to supply natural gas to their homes and businesses.³

Testimony at the January 9, 2003 Hearing

At the January 9, 2003 Hearing, Mr. Charles Stahl, City Manager for the City of Elizabethton, testified regarding the franchise agreement and the proposed amendment. Mr. Stahl testified that United Cities has been providing service in Elizabethton for a number of decades. Mr. Stahl stated that the current franchise agreement expires in 2008. Mr. Stahl stated that he was involved in negotiations in 2002 to amend the franchise agreement to provide for a franchise fee of five percent (5%). Mr. Stahl further stated that the City explored the issue of a franchise fee independently in the late 1990s and studied the issue further in 2002 in discussions with the Company.

Mr. Stahl testified that the City currently charges a franchise fee of five percent (5%) to a cable service provider, which the City considers a utility provider. He stated that two budget issues prompted the City to negotiate a franchise fee: (1) the City's capital improvement program and the City's need to maintain infrastructure and (2) the loss of the City's largest employer and taxpayer.⁴ According to Mr. Stahl, after the City determined that a franchise fee was necessary, he contacted United Cities and met with Mr. Cox and Mr.

³ Pre-filed Direct Testimony of Ricky Watford, January 6, 2003, p. 2.

⁴ Mr. Stahl did not identify this entity.

Watford. Mr. Stahl stated that United Cities provided information on the financial impact of a franchise fee, both on the City's revenue requirements and on customers' rates. Mr. Stahl stated that the parties discussed several drafts of the amendment. He stated that the issue of possible condemnation of the Company's Elizabethton system by the City was not discussed. He further stated that the amendment was the result of "a friendly arm's length process that both parties met upon and had multiple conversations."⁵

Mr. Stahl testified that when the franchise fees are collected the proceeds go into the City's general fund and are used, in large part, for infrastructure. Mr. Stahl further stated that the amendment is necessary and proper for the public convenience and properly conserves the public interest. Mr. Stahl testified that the City held public hearings on the amendment and that only one citizen had asked about the franchise fee.

Mr. Watford also testified at the January 9, 2003 Hearing. Mr. Watford stated that the amendment is necessary for United Cities to serve and maintain its customer base and maintain its system in Elizabethton. Mr. Watford described the negotiation process in substantially the same manner as in his pre-filed testimony. Mr. Watford testified that in his opinion the proposed amendment is necessary and proper for the public convenience and properly conserves the public interest.

Findings and Conclusions

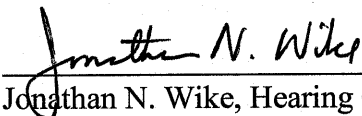
The proposed amendment to United Cities' franchise agreement with Elizabethton continues a longstanding franchise arrangement in a community where United Cities has extensive operations that rely on use of the public rights-of-way. This franchise arrangement has been and continues to be of mutual benefit to United Cities, its customers, and the

⁵ Transcript of Proceedings, January 9, 2003, pp. 12-13.

community. The proposed amendment was undisputed. The proposed amendment imposing a five percent (5%) franchise fee was the result of arm's-length negotiations between the Company and the City. None of the testimony presented in connection with this fee suggests that the fee is contrary to the public interest. The Hearing Officer finds that the proposed amendment is in the public interest. Accordingly, the proposed amendment to the Elizabethton franchise agreement is approved pursuant to Tenn. Code Ann. § 65-4-107.

IT IS THEREFORE ORDERED THAT:

1. The proposed amendment to the franchise agreement between United Cities Gas Company and the City of Elizabethton, Tennessee is approved.
2. Any party aggrieved by the Hearing Officer's decision in this matter may file a Petition for Reconsideration with the Hearing Officer within fifteen (15) days from the date of this Order.


Jonathan N. Wike, Hearing Officer

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ORDINANCE NO. 38-9

"AN ORDINANCE TO AMEND ORDINANCE 23-8, ADOPTED JULY 23, 1987, WHICH ORDINANCE GRANTED A TWENTY YEAR FRANCHISE TO UNITED CITIES GAS COMPANY, BY ADDING SECTION 8 TO THAT ORDINANCE TO PROVIDE FOR A FIVE PERCENT (5%) FRANCHISE FEE TO BE ASSESSED ON NATURAL GAS FURNISHED INSIDE THE CITY LIMITS."

WHEREAS, the Elizabethton City Council adopted Ordinance Number 23-8 on July 23, 1987 and granted to Tennessee-Virginia Energy, a division of United Cities Gas Company, an exclusive franchise for a twenty-year period expiring on April 15, 2008; and,

WHEREAS, the United Cities Gas the grantee under Ordinance Number 23-8 is now a division of ATMOS Energy Corporation; and,

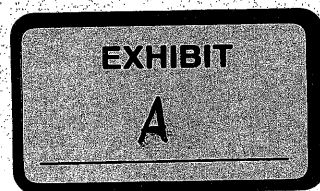
WHEREAS, the parties have been in negotiation and agreed it is proper to implement the five per cent (5%) franchise fee authorized by statute by amending Ordinance number 23-8; and,

WHEREAS, the health, safety and welfare of the citizens and residents of the City of Elizabethton, Tennessee, will be best served by the amendment of the gas franchise.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCILMEN OF THE CITY OF ELIZABETHTON, TENNESSEE, as follows:

Section 1: That Ordinance Number 23-8 adopted July 23, 1987 be and it hereby is amended by the addition of Section 8 created to read as follows:

Section 8:
As consideration for the grant of the franchise and rights herein and for the use by the Grantee of the streets, roads, highways, alleys, public ways and other real



property owned or controlled by the City, Grantee shall pay to the city, on or before the last day of January, April, July, and October, during the term hereof, a franchise fee equal to five percent (5%) of grantee's gross receipts derived from the sale and distribution by Grantee of natural gas within the city limits of the city during the preceding calendar quarter.

The City shall have access at all reasonable times, upon reasonable advance notice, to relevant books of the Grantee for the purpose of ascertaining the amount of franchise fee due the City. The Grantee shall furnish annually a report to the City showing the amount of gross revenues from Grantee's sale of natural gas within the City.

City will promptly notify Grantee in writing of any geographic areas annexed by the City during the term hereof ("Annexation Notice"). Any such Annexation Notice shall be sent to Grantee by certified mail, return receipt requested, and shall contain the effective date of the annexation, maps showing the annexed area and such other information as Grantee may reasonably require in order to ascertain whether there exist any customers of Grantee receiving natural gas service in said annexed area. To the extent there are such Grantee customers therein, then the gross revenues of Grantee derived from the sale and distribution of natural gas to such customers shall become subject to the franchise fee provisions hereof effective on the first day of Grantee's billing cycle immediately following Grantee's receipt of the Annexation Notice. The failure by the City to advise Grantee in writing through proper Annexation Notice of any geographic areas which are annexed by the City shall relieve Grantee from any obligation to remit any franchise fees to City based upon gross revenues derived by Grantee from the sale and distribution of natural gas to customers within the annexed area until City delivers an Annexation Notice to Grantee in accordance with the terms hereof.

The franchise fee provided herein, together with any and all charges of the City for water, sewage and garbage services provided by the City to Grantee, any and all sales taxes collected by Grantee, and any and all ad valorem taxes assessed by the City against Grantee's property, shall constitute the only amounts for which Grantee shall be obligated to pay to the City and shall be in lieu of any and all other costs, levies, assessments, fees or other amounts, of any kind whatsoever, that the City, currently or in the future, may charge Grantee or assess against Grantee's property.

This Amendment to Franchise is subject to the approval of the Tennessee Regulatory Authority (TRA) and if the franchise fee payable hereunder, or any portion thereof, is not approved by the TRA, then such fee or so much thereof as is not approved shall be rescinded and any monies previously paid to the City by Grantee on account thereof shall be refunded to Grantee and its affected rate payers.

Section 2: All provisions of Ordinance Number 23-8 not herein specifically amended shall remain in full force and effect and are hereby ratified, confirmed and approved as if set forth verbatim herein and a copy of Ordinance Number 23-8 is attached hereto and made a part hereof by reference.

Section 3:

This ordinance shall take effect ten (10) days from and after its final passage and shall be subject to acceptance by the Grantee and approval by the Tennessee Regulatory Authority.

PASSED ON FIRST READING: _____

PUBLIC HEARING: _____

PASSED ON SECOND READING: _____

July 11, 2002

August 8, 2002

August 8, 2002

CITY OF ELIZABETHTON, TENNESSEE

BY: _____

SAM LAPORTE, MAYOR

ATTEST:

H. Bradley Moffitt
H. BRADLEY MOFFITT, CITY CLERK

APPROVED AS TO FORM:

Roger G. Day
ROGER G. DAY, CITY ATTORNEY

ACCEPTANCE BY UNITED CITIES GAS COMPANY

I, the undersigned authority, being authorized so to do, hereby accept the foregoing Ordinance amending Ordinance Number 23-8 on behalf of United Cities Gas Company, a Division of ATMOS Energy Company, and on behalf of said Grantee do hereby ratify all other provisions of Ordinance Number 23-8 not herein amended.

UNITED CITIES GAS COMPANY

BY: _____

Robert M. Kline
Robert M. Kline Vice President
PRINTED NAME AND TITLE

STATE OF TENNESSEE
COUNTY OF CARTER
CITY OF ELIZABETHTON

I, H. Bradley Moffitt, hereby certify that I am the duly qualified and acting City Clerk of the City of Elizabethton, Tennessee and as such official I further certify that attached hereto is a copy of Ordinance No. 38-9 of the City Council of the City of Elizabethton, Tennessee passed on August 8, 2002; that I have compared said copy with the original Ordinance, and that the same is a true and correct copy thereof.

WITNESS my signature and the official seal of said City this 12th day of August, 2002.

H. Bradley Moffitt
City Clerk
(SEAL)